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Combatant's Privilege Reconsidered

Harry van der Linden

Abstract

International law grants to legitimate combatants the right to kill enemy soldiers both in wars of aggression and defensive wars. A main argument in support of this "combatant's privilege" is Michael Walzer's doctrine of the "moral equality of soldiers." The doctrine argues that soldiers fighting in wars of aggression and defensive wars have the same moral status because they both typically believe that justice is on their side, and their moral choices are equally severely restricted by the overwhelming coercive powers of the state, including propaganda, conscription, and harsh penalties for the refusal to fight. Recently, this doctrine has been convincingly refuted, at least with regard to aggressor soldiers who are part of professional volunteer armies in democratic societies. However, Walzer's critics have not challenged combatant's privilege, primarily for a variety of pragmatic reasons. This paper examines these reasons, finds them not decisive, and articulates a modest proposal for denying, under some conditions, combatant's privilege to aggressor soldiers, making their very participation in a war of aggression a war crime. It is concluded that unrestricted combatant's privilege is in tension with the aim of the United Nations "to save succeeding generations from the scourge of war."

We commonly see the killing of human beings, except in cases of true self-defense, as a horrendous moral crime deserving the most severe legal punishment. Yet, we commonly accept that individuals have a legal right to kill persons on a large scale once some legitimate authority, in particular the state, puts them in uniform, provides them with weapons, and commands them to execute a war. What is remarkable and morally questionable concerning this "combatant's privilege" is that international law and custom grant it irrespective of the reasons behind the war. In other words, soldiers have a right to kill whether their fight is an act of pure aggression or an act of pure self-defense. To be sure, the combatant's right to kill is restricted in that it is a war crime to deliberately kill enemy noncombatants, notably civilians not directly engaged in defense and soldiers *hors de combat*. However, it still means that the war convention grants combatants authorized by their governments to fight a war of

aggression the legal right to kill enemy soldiers who rightfully seek to protect their country and fellow citizens. Moreover, the war convention permits these aggressor soldiers to indirectly kill enemy civilians in pursuit of their military objectives as long as this “collateral damage” is proportional to the importance of these objectives.

A major argument in support of combatant’s privilege is Michael Walzer’s doctrine of the “moral equality of soldiers.” On his account, soldiers fighting in wars of aggression and defensive wars have the same moral status because they both typically believe that justice is on their side, and their moral choices are equally severely restricted by the overwhelming coercive powers of the state, including propaganda, conscription, and harsh penalties for the refusal to fight.¹ Walzer’s doctrine conflates the implausible view that soldiers fighting a war of aggression do not commit a moral wrong by killing enemy soldiers with the more plausible view that aggressor soldiers should not be held morally liable for their wrongful killings of enemy soldiers. However, recent critics of Walzer’s doctrine, such as Jeff McMahan and J. Joseph Miller, have convincingly shown that even in the latter form his doctrine is to be rejected.² In a word, the major problem with Walzer’s doctrine is that time has caught up with it: his characterization of aggressor soldiers as poorly informed instruments of the state bereft of any real freedom of action fits ill with the position of soldiers in the modern professional volunteer army in democratic societies. These soldiers can decline to serve; they have the opportunity and competency to assess the military conflicts of their country; and so they can be held morally responsible for participating in wars of aggression. And the future may only further outdate Walzer’s doctrine in that the current trend is to increasingly make use of private military contractors fighting side by side with regular armed forces.

Granted that soldiers, especially in democratic societies with professional volunteer armies, can be held morally culpable for fighting a war of aggression, should they be denied combatant’s privilege? Moral culpability of aggressor soldiers establishes a necessary condition for modifying combatant’s privilege, not a sufficient one. Indeed, the recent critics of Walzer’s doctrine of the moral equality of soldiers have argued against modifying this privilege. For them, it is simply important as such to establish that soldiers may be culpable, or the argument’s main pay-off is that

some soldiers may refuse to fight in a war of aggression. What holds these critics back from challenging the current laws of war?

McMahan offers in synoptic fashion three arguments against the notion that combatant's privilege might be denied to aggressor soldiers so that they become appropriate subjects for some form of punishment: First, it is simply impossible for one country, or even an international body, to provide fair trials for all the members of an army. Second, there is the problem of "victor's justice": the winning side will declare its war to have been just and will be tempted to seek vengeance against vanquished soldiers under the guise of punishment. Third, if all combatants have to fear this fate, they may be deterred from surrendering; and it is irrational to establish incentives to protract wars rather than to terminate them.³

A fourth objection is a variant of the last one: once soldiers fear prosecution for fighting an unjust war, they may have a reduced interest in not committing traditional war crimes (such as directly killing noncombatants). Their reasoning might be that since their capture might lead them to be convicted in any case, having a charge added of having committed traditional war crimes might not make much difference.

Let me first address the last two objections since they have less weight. It is correct that it is important not to provide incentives for lengthening wars by discouraging surrender, but it is even more important in terms of reducing human suffering to provide incentives for not initiating wars of aggression in the first place. The prosecution of unjust combatants will reduce the willingness of combatants to participate in wars of aggression, especially in the case of professional volunteer armies.⁴ Of course, the prosecution of the leaders of wars of aggression also has this impact, but the two are not exclusive and the prosecution of soldiers may be more effective in the long run. After all, it is more difficult for aggressor combatants to escape prosecution than it is for political and military leaders. The problem of a reduced incentive for surrendering by soldiers who fear prosecution can also be rebutted directly by a stipulation that surrender is a ground for dropping prosecution charges of aggressor combatancy or for reducing the penalty. The disincentive for not committing traditional war crimes can be removed in a similar way by making the penalty of aggressor combatancy a much less severe one. This is also morally

imperative in that in general more extenuating circumstances are in place for committing the wrong of fighting in a war of aggression than in committing traditional war crimes.

The first two objections against changing combatant's privilege involving the problems of feasibility and "victor's justice" can best be met by articulating fair and feasible procedures for determining and prosecuting aggressor combatancy. What follows is a cautious and preliminary proposal in this direction, mindful of the fact that we should avoid taking a step backward toward a vision of war as a punitive enterprise.

Suppose that a country prepares to go to war (and so the war is not a war of reactive self-defense). Suppose further that the Security Council condemns the war preparation as an unjust act against a sovereign state. Under the current composition and voting procedures of the Security Council, this declaration of an act of war as illegal is bound to be a selective judgment in the sense that all members with veto power, as well as, presumably, affiliated friendly nations, will avoid such a judgment (even if it would be warranted). So assume that the Security Council surrenders its veto system, increases its membership, becomes more representative of the global community, and operates through a voting system of a two-third's majority. Now if this Security Council declares, both before and after the outbreak of hostilities, that a given country's non-reactive act of war is illegal and divulges this decision as widely as possible, then the soldiers of this country lack combatant's privilege. Their killing becomes a war crime and should be prosecuted with the same protections in place as the prosecution of traditional war crimes. Excusing conditions include duress and lack of knowledge, making the prosecution of soldiers from closed societies much less likely than the prosecution of soldiers from democratic societies with professional volunteer armies. Prosecution should take place by an international judicial body similar to the International Criminal Court, or, at least, such a body should supervise the prosecution. Both feasibility and moral considerations demand that penalties generally be modest. Repeat offenders should receive harsher penalties. Rank could be taken into account, and it might be practically necessary in some cases to pursue only officers. Feasibility and moral considerations might

necessitate that alternatives to traditional penalties are pursued, such as that aggressor combatants in custody would participate in truth and reconciliation hearings prior to their return to their home country.

Filling out the details of this proposal falls outside my competency as a political philosopher concerned with issues of war and peace; it is a task that should be taken up by international law scholars. It might turn out that there are legal obstacles that are difficult and perhaps even too costly to overcome. So let me end with a modest, yet important, conclusion. The United Nations was created with the intent “to save succeeding generations from the scourge of war.” The laws of war predate the United Nations, even though their formalization in various conventions has mostly taken place in later years. The laws of war are based on a more realist premise, seeking only to *restrict* the scourge of war.⁵ There is no doubt that the laws of war have contributed to this aim. At the same time, we should not give up on the more ambitious goal of the United Nations. In my view, we face a future in which unrestricted combatant’s privilege might increasingly be an obstacle to enduring global peace because, for one thing, we face a future in which fewer soldiers with more effective weapons can be paid to pursue aggressive designs. More generally, the current laws of war create a zone of legally permitted killing by combatants even in cases where this is undeniably morally reprehensible. In practice, this influences the moral assessment of aggressor combatants in the wrong direction, just as its legal condemnation and prosecution would have the reverse moral impact, even if punishment would remain largely symbolic. It would be unwise to modify the laws of war and set aside the principle of the equality of combatants if it would increase the suffering inflicted by soldiers during war, but the case for this happening is not clear cut. So, for the sake of global peace, we should at least be willing to reconsider unrestricted combatant’s privilege, rather than treat it as a humanitarian dogma.

Notes

¹ See Michael Walzer, *Just and Unjust Wars*, 3rd edition (New York: basic Books, 2000), pp. 40-41 and 127-28.

² See Jeff McMahan, "The Ethics of Killing in War," *Philosophia* 34 (2006): 23-41, and J. Joseph Miller, "Jus ad bellum and an Officer's Moral Obligations: Invincible Ignorance, the Constitutions, and Iraq," *Social Theory and Practice* 30 (October 2004): 457-84.

³ McMahan, "The Ethics of Killing in War," p. 38.

⁴ Cf. Christopher Kutz, "The Difference Uniforms Make: Collective Violence in Criminal Law and War," *Philosophy & Public Affairs* 33 (Spring 2005): 148-80, pp. 167-68.

⁵ See Francois Bugnion, "Just wars, wars of aggression, and international humanitarian law," *International Review of the Red Cross* (September 2002): 523-46. Translated from French and posted on the website of the ICRC, [http:// www.icrc.org](http://www.icrc.org).